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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE OSCAR CHAVEZ,

Defendant and Appellant.

G038830

(Super. Ct. No. 02NF2781)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and
Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jose Oscar Chavez was convicted of second degree murder and shooting from a motor vehicle. He claims the trial court committed numerous errors, including admitting his statement to the police and refusing to permit him to dismiss his retained attorney. He also claims there was insufficient evidence to support a gang enhancement. We find no error and affirm.

I

FACTS

At approximately 10:45 p.m. on August 28, 2002, Maria Medina, her cousins Leonardo Rojas and George Rojas¹ were standing outside the home of Leonardo's wife on Garnet Street. They were looking at stereo speakers Leonardo had brought outside. As they were talking, Medina noticed a green truck drive by, followed by a car. The vehicles passed by a second time, driving more slowly, with their headlights turned off. The truck stopped, and Medina heard a shot, and saw Leonardo grab his chest. Leonardo died from the gunshot wound later that night.

Immediately after Leonardo was shot, George got into his own vehicle and followed the truck, eventually obtaining a license plate number that he gave to the police. A records check showed the truck was registered to the father of Miguel Luna. Luna was known to the police as "Big Boy" of the La Jolla gang. The police conducted surveillance, and observed Luna leave the trailer park. He was with three or four other individuals, and he made a hand motion simulating shooting with his fingers. One of the individuals, later identified as defendant, walked away from the group.

Later that afternoon, Luna went behind his trailer, and emerged with what appeared to be a handgun wrapped in cloth. He then appeared between two trailers with nothing in his hands. Luna was detained at that point, and the officers recovered a

¹For ease of reference, we refer to Leonardo Rojas and George Rojas by their first names. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

handgun and some bullets under the crawl space of a vacant trailer. The gun was loaded with four bullets and one spent shell. The police found 12 additional bullets wrapped in a handkerchief.

On August 30, Detective Scott Rudisil of the Fullerton Police Department and two other officers interviewed defendant for approximately three hours. He was first asked background questions, such as where he lived and where he went to school. At the time, defendant was 17 years old. Rudisil asked defendant if he knew why he was there, and defendant replied: “You woke me up. I don’t know. My girlfriend told me that a guy has been killed on Garner Street. She told me that, um, somebody saw me driving my Dodge van and got in an argument with that guy and . . .”

Rudisil interrupted at that point and asked defendant if he knew why he was there. Defendant replied “I think so” and when prompted again, said that the officers who brought him to the police station said he was “charged for murder.” Defendant was then advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant indicated that he understood each of these rights. Rudisil then said, “Okay. Then can we talk about what happened?” Defendant replied, “Like what happened.” Rudisil stated that he wanted to hear defendant’s side of what had occurred. He stated that when a crime like this one occurred, detectives talk to many people, and his name had come up. They wanted to talk to defendant and see what he knew about the case. He asked, “Okay?” and defendant replied with, “Yeah.” He then participated in an interview with police, eventually confirming that he had been driving the truck from which the shooting took place. He described being followed after the shooting. He told the officers that he did not know that Leonardo would be killed, but that defendant thought the intent was to frighten him by shooting in the air. He knew the victim as “Koyak” and agreed with the detective’s suggestion that the shooting occurred because Leonardo had become a problem that needed to be dealt with.

Defendant and four codefendants were charged with five counts relating to the shooting: murder (count one; Pen. Code, § 187, subd. (a));² shooting from a motor vehicle (count two; § 12034, subd. (c)); being an active gang participant carrying a concealed firearm in a vehicle (count three, §§ 12025, subds. (a)(3), (b)(3)); and street terrorism (count five, § 186.22, subd. (a)).³ As to defendant, the information also alleged the special circumstance of murder committed for a criminal street gang purpose (§ 190.2, subd. (a)(22)), and the special circumstance of murder by drive-by shooting (§ 190.2, subd. (a)(21)). Street gang enhancements were also alleged pursuant to section 12055.53, subdivisions (d) and (e)(1) and section 186.22, subdivision (b)(1)(A) as to counts one and two. The prosecution's subsequent motion to dismiss counts three and five, and the special circumstances allegations, were granted. Defendant's motion to exclude his statement to the police was denied.

Luna testified for the prosecution at trial pursuant to a plea bargain. Pursuant to the plea, he admitted that he aided and abetted defendant and codefendant Miguel Frias in Leonardo's murder. Luna further admitted that he was a member of the La Jolla gang and had been so for three or four years. His gang name was Big Boy. Luna testified that defendant was not a member of the gang, but belonged to a "party crew" called Los Compitas.

Luna testified about the day of the shooting. Earlier in the day, he shot the gun that was later used in the shooting in defendant's presence, to show off to defendant and gain more respect. Later, at defendant's home, Luna, defendant and several others were present. They were drinking. Defendant took the gun from under the seat of a Ford Explorer that belonged to Luna's father, where he had placed it earlier in the day.

² Subsequent statutory references are to the Penal Code.

³ Count four charged only Luna.

Defendant gave the gun to Frias, and the group started talking about “payback,”⁴ specifically, a shooting, against “rivals.” Luna stated that Frias had the idea of going to Placentia, where a rival gang called Plas was located, to do payback. The group took two cars, with Luna, Frias, and defendant in the Ford Explorer. Defendant was driving.

They drove to Garnet Street, with Frias holding the gun. He directed defendant to circle the street and to turn off the lights. Frias stated that he wished to kill someone. Defendant stopped the car at Frias’s direction, and Frias shot Leonardo. Luna testified that Leonardo claimed to be from Placentia gang, and that was a good enough reason kill him. He stated that Chavez followed instructions and did not object to anything.

Also testifying at trial was Detective Jeff Stuart, a gang detective with the Fullerton Police Department. He testified about gang culture, the concept of territory, and the La Jolla and Placentia gangs. He stated that the area where the shooting took place is claimed by Plas, a traditional Hispanic gang in Placentia and part of Fullerton. La Jolla gang claims an area between the 91 and 57 Freeways. The two are rival gangs, and Stuart was aware of two homicides between the two gangs as well as numerous other crimes. Stuart testified that La Jolla, as of August 2002, had 120 to 130 members, and that its primary activities were vandalism, carjackings, aggravated assaults and murders. They had several nicknames and signs.

Stuart testified that although Luna was a La Jolla member, defendant was not. He was a member of the Las Compitas party crew. A party crew is a group of people who socialize together, but do not want to engage in criminal gang activity. Members of Los Compitas live within the La Jolla gang territory, and because they are

⁴ According to Luna, payback meant getting even. When a rival gang member did something, payback equal to or greater than what was done to them was necessary, and it could be done on an individual or anybody in the gang. If a gang failed to retaliate, it lost respect.

not a threat to the gang, they are allowed to participate in their activities in the area. Several months before the shooting in this case, a member of Los Compitas was stabbed by a member of another party crew, Los Atrevedos, during a fight at a dance club. Members of Los Atrevedos live in Plas territory.

Stuart further testified that La Jolla's reputation would be enhanced if a La Jolla member was involved in a drive-by shooting in Plas territory. It was dangerous for a La Jolla member to be in Plas territory, and doing so enhances that gang member's reputation. Leonardo was not known to be a member of a gang or party crew.

At the conclusion of trial, the jury convicted defendant of counts one and two, second degree murder and shooting from a motor vehicle. The jury also found the alleged enhancements to be true. Defendant's subsequent motion to relieve his attorney was denied. He was sentenced to state prison for a total term of 40 years to life.

II

DISCUSSION

Miranda Waiver

Defendant first claims that his confession was in violation of the precepts set forth in *Miranda*. He claims that his waiver of his rights was not intelligent, knowing or voluntary. Defendant asserts that in addition to his youth, he suffered from untreated mental illness, and had low intelligence and poor English skills.

"An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominantly legal; and it

scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. [Citation.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

A valid *Miranda* waiver can be express or implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248 (*Whitson*).) “*Miranda* holds that ‘[the] defendant may waive effectuation’ of the rights conveyed in the warnings ‘provided the waiver is made voluntarily, knowingly and intelligently.’ [Citation.]” (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) “To determine whether a minor’s confession is voluntary, a court must look at the totality of circumstances, including the minor’s age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement. [Citations.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 383.) Factors relevant to assessing the voluntariness of a minor’s statements include: “(1) his prior exposure to the police and courts (2) admonition of his legal rights given him before his confession (3) his age and intelligence (4) the length of detention and interrogation (5) the presence or absence of counsel or family and (6) the accused’s physical and mental conditions of health. [Citations.]” (*In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756-757.)

With respect to the first prong, defendant did have prior experience with police, including traffic violations and a prior petty theft. While defendant minimizes these experiences, asserting “a total lack of legal sophistication,” even relatively minor prior contacts are relevant. (*People v. Lewis, supra*, 26 Cal.4th at pp. 383-385.) The second prong concerns the actual admonition of defendant’s legal rights. Defendant was indisputably read the *Miranda* warnings, and stated that he understood each of them. He continued answering questions thereafter, which is pertinent to finding an implied waiver. (*Whitson, supra*, 17 Cal.4th at pp. 247-248.)

As to defendant’s age and intelligence, he was 17 at the time of his interrogation. His age alone is not dispositive; confessions of defendants as young as 12 have been properly admitted. (*In re Charles P.* (1982) 134 Cal.App.3d 768.)

Defendant’s assertions of his own psychological problems and mental aptitude are based

on testing that was done prior to trial. Although the tests agreed that he had some degree of mental illness, they disagreed on its severity. Further, any such problems are not readily apparent from the transcript, in which defendant appeared to understand the detective's questions and provide responsive answers to them. “‘Neither a low I.Q. nor any particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood.’” (*In re Brian W.* (1981) 125 Cal.App.3d 590, 603 [15-year-old defendant had an IQ of 81 and the mental age of an 11 or 12 year old].)

As to the length of detention and interrogation, a three-hour interrogation is not overly long. Defendant's handcuffs were removed, and he was offered a drink. He did not indicate any kind of physical stress or discomfort. His claim that the detectives sought incriminating information prior to the *Miranda* warnings is unfounded; the detectives simply asked if he knew why he was there, resulting in defendant's statement that he heard a man had been killed on “Garner” street. The question neither asked for an incriminating response, nor was the response itself incriminating.

With respect to the fifth factor, defendant is correct that neither counsel nor his parents were requested. Unlike the case he cites, however (*Gallegos v. State of Colorado* (1962) 370 U.S. 49, 55), where the defendant was held for five days prior to questioning,⁵ here, defendant was interviewed promptly after his arrest. As to the final factor, there was no indication of any physical infirmity, and as discussed above, any mental problems were both not apparent and alone are not sufficient to invalidate his implied waiver.

“The essential concern articulated by *Miranda* in this regard is that statements made by a defendant are ‘truly the product of free choice.’ [Citation.] Any

⁵ This was also a pre-*Miranda* case, and therefore lacked the focus on whether the defendant had ever been advised of his constitutional rights.

interrogation practice which is likely to exert such pressure upon an individual as to disable him from making a free and rational choice between speaking and silence, is proscribed. The essential question is: Were the statements the product of compulsion?” (*In re Eduardo G.*, *supra*, 108 Cal.App.3d at p. 755.) We find none, and given the totality of the circumstances, we find the trial court correctly concluded that defendant knowingly and intelligently waived his *Miranda* rights. The facts contradict defendant’s characterization of himself as a “frightened boy.” This is not a close case. He was 17, a member of a party crew and friends with an individual he knew was a gang member. The facts demonstrate defendant was of a sufficient age and experience to indicate that he both voluntarily chose to continue speaking with the detectives and that he understood his rights.

Defendant further claims that the circumstances were such that his will was overborne and his statements were not voluntary. Again, we look to the totality of the circumstances. Nothing about the physical conditions or the detectives’ statements indicates defendant’s statements were not “essentially free” or that his “will was overborne.” (*People v. Memro* (1995) 11 Cal.4th 786, 827.)

Dismissal of Retained Counsel

Defendant next contends the trial court applied the wrong standard and improperly denied his request to discharge his trained counsel and appoint counsel to prepare a motion for new trial. Defendant was originally scheduled for sentencing on May 4, 2007. That date was continued to May 18, at which time defendant filed a motion for a new trial as to the gang enhancements. Sentencing was again continued, and on May 23, the court denied the new trial motion. Sentencing was again continued, at defense counsel’s request, due to a problem with interviewing defendant’s parents for the probation report. The court advised defense counsel that it wanted this problem resolved, and defense counsel agreed.

On June 18, the next court date, defense counsel informed the court that defendant was requesting another continuance and a court appointed attorney. Defendant also submitted a motion to reconsider the denial of the new trial motion, apparently signed by his father on defendant's behalf.

With regard to the request for a new attorney, counsel stated that defendant had lost confidence in him. The court noted the continuing delays, and then inquired whether counsel was privately retained. Upon learning that he was, the court stated, "Okay. Well, then this isn't really a true *Marsden* motion because my recollection is *Marsden* does not apply to retained counsel, but there is a case that does. I think it's *Ortiz* or *Ochoa*." Though the court found the last minute request "disruptive of courts process" it stated it would hear the request.

Defendant informed the court he did not want his attorney to represent him any longer. He stated he did not agree with the work his attorney had performed during his trial. He believed he had lost the trial due to his attorney's incompetence and wanted an appointed attorney to assist him with a motion on that point. Defendant said his investigator had found information his attorney had failed to present at trial.

The court then inquired whether defendant and his attorney had gotten along during the trial, and whether they had been able to discuss the case, and defendant said yes. Defense counsel stated that he was not asking to be relieved. No other lawyer was present to substitute for counsel. After a recess, the court denied defendant's motion.

Criminal defendants have the right to dismiss a retained attorney. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) A defendant need not have cause or demonstrate that his attorney is incompetent. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 863 (*Munoz*).) This rule also applies to posttrial proceedings. (*Ibid.*) The trial court, however, may deny a motion to relieve appointed counsel if, within its discretion, relieving retained counsel would result in "disruption of the orderly processes of justice." (*Ortiz, supra*, 51 Cal.3d at p. 983.)

Defendant claims the court applied the wrong standard, confusing *Marsden* with a situation in which the defendant had retained counsel. The record, however, shows otherwise. Although the court, by way of analogy to a *Marsden* motion, pointed out that strategic conflicts would not be grounds to dismiss an appointed attorney, the court was aware that *Marsden* did not apply. The court cited and reviewed the holding of *Ortiz*, and quoted it on the record: ““The court held that a trial court may not require an indigent criminal defendant to demonstrate inadequate representation by his retained attorney or to identify an irreconcilable conflict before it will approve the defendant’s timely motion to discharge his retained attorney and obtain appointed counsel.””

The court then went on to discuss the facts in this case, noting that the motion for new counsel was combined with the motion for reconsideration. The court stated its concern that the intent might be to disrupt the court process and stall sentencing for as long as possible. This statement also makes clear that the court was considering the matter under the *Ortiz* standard, and not misapplying *Marsden*. The court felt the “newly discovered evidence” defendant purported to present in his motion for reconsideration was “basically old news.” The court made clear it was not ruling on the merits, but considering the facts in light of the *Ortiz* standard. The court ultimately concluded that defendant was engaging in tactics to delay: “I’m simply looking at it to see whether it is disruptive, a stall tactic designed to delay the proceedings. [¶] And in light of it . . . I think that it is. I think it’s an attempt to delay the proceedings. It’s a stall tactic. It’s certainly disruptive. That is, the making this motion on the day of sentencing for court appointed counsel, renewing a motion for . . . reconsideration of a new trial, and doing all of this on the day of sentencing, with a motion for new trial having already been heard and denied, I find is disruptive of court processes. It’s not fair to the people. It’s not fair to the victims, and it’s not fair to the court to do this at the last minute.”

The court clearly applied the correct standard, denying defendant’s request because it would result in “disruption of the orderly processes of justice.” (*Ortiz, supra*,

51 Cal.3d at p. 983.) The court’s reasoning was sound and we find no abuse of discretion in its ruling.

Gang Enhancement

Finally, defendant argues that since neither he nor the victim were gang members, there is insufficient evidence to conclude that the crime was committed with the intent to promote, further, or assist criminal conduct by gang members. Thus, he argues the enhancements pursuant to 12055.53, subdivisions (d) and (e)(1) and section 186.22, subdivision (b)(1)(A) should be reversed.

“Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]” (*People v. Olguin* (1999) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate “‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant challenges the sufficiency of the evidence only as to whether the prosecution proved that defendant committed the crimes with the specific intent to promote, further, or assist criminal conduct by gang members.

The California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20, et seq.) criminalizes specified acts when committed in connection with a criminal street gang. It also provides for enhanced punishment for any misdemeanor or felony committed “for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (d).)

Although this is a troublesome issue in some cases, it is not here. The evidence was overwhelming and undisputed that this crime occurred with the intent to and for the benefit of the La Jolla gang. As respondent correctly notes, there was no other motive, and Luna testified at length as to the circumstances that led to the crime, specifically, the desire for gang “payback.” Despite defendant’s lack of gang membership, the only reasonable conclusion as to why this crime occurred is to benefit Luna’s gang. They (erroneously) believed the victim was a member of the gang, and therefore the reputation of Luna’s gang would be enhanced by the crime. They specifically chose to drive to Plas territory to commit the crime for its perceived benefit to the gang. The evidence was more than undisputed — it could hardly be more clear and obvious as to why this crime was committed. We find no error.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O’LEARY, J.